No. 2451

United States
Circuit Court of Appeals
For the Ninth Circuit

ALAMO CATTLE COMPANY, Sociedad Anonima, a Corporation,

Plaintiff in Error,

vs.

JOHN G. HALL,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the District of Arizona

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United States Circuit Court of Appeals for the Ninth Circuit.

ALAMO CATTLE COMPANY,
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Plaintiff in Error,
vs.
JOHN G. HALL,
Defendant in Error.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

This is a writ of error directed to the United States District Court of Arizona to review the proceedings and judgment entered on May 29, 1914, in the said United States District Court upon a verdict of a jury in favor of Defendant in Error and against Plaintiff in Error.

STATEMENT OF FACTS.

On the 16th day of January, 1913, the Alamo Cattle Company, Sociedad Anonima (hereinafter called the "Company"), entered into a contract for the sale of cattle with one E. W. Myers (p. 306). By the terms of the contract the company agreed to sell to Myers from 4,000 to 5,000 two-year old steers and 1,000 four-year

old steers "as good or better than the Terrasas cattle." The price was to be twenty-three ($23) dollars per head for the two-year olds, and twenty-eight ($28) dollars per head for the four-year olds. The cattle were to be delivered f.o.b. at Nogales, Arizona, station, all duties and expenses paid by the Company. The buyer was to furnish the cars for the cattle, and payment was to be guaranteed in a manner satisfactory to the First National Bank of Nogales, Arizona, before each shipment crossed the line. The buyer was to have the privilege of cutting out and rejecting fifteen (15%) per cent of the cattle after all unmerchantable cattle had been cut out by the Company. The Company acknowledged receipt of ten thousand ($10,000) dollars from the buyer, who agreed to pay the balance of the purchase money when said cattle were delivered on board cars, and failing to do so he was to forfeit that amount. The Company agreed to pay two ($2) dollars in addition to returning the forfeit, on each head it should fail to deliver; this was to constitute the buyer's entire claim for damages. The cattle were to be cut at Moraga or Distilladero. The buyer was to give fifteen (15) days' notice for each delivery in train-load lots during April and May. (Exhibit A, p. 9.)

The Company is a Mexican corporation and owns two ranches in the State of Sonora, Mexico; one called La Moraga, 56 miles south of Nogales, and the other called the Distilladero, about 9 miles from Nogales (p.

253). The Company bought and sold Mexican cattle, often selling on commission (p. 214). At La Moraga ranch the Company held its main herds, while the Distilladero ranch was used as a delivery point (pp. 246, 271).

About February 4, 1913, Myers assigned the contract to Hall, the plaintiff below (pp. 129-130). The consideration was the repayment of the ten thousand ($10,000) dollars advance money and in addition three ($3) dollars per head on the two-year olds and four ($4) dollars per head on the four-year olds (pp. 11-12).

Witness K. D. Oliver was Hall's fully authorized agent in this entire transaction (p. 144).

About April 6, 1913, Mr. Oliver went to La Moraga to show Mr. Johnston and Mr. Moore the cattle. Mr. Johnston was manager of Clay, Robinson & Company, who later contracted to purchase from Hall the two-year olds under the contract (p. 41). Mr. Moore was a cattle man from Denver, and was also a prospective purchaser (pp. 160, 254). These gentlemen were pointed out cattle of the kind which would be delivered them under the contract (p. 161). At that time the Company was ready to deliver a train load of two-year old steers; but Oliver requested that the deliveries be deferred until May. Accordingly, Oliver gave the Company notice about April 22d that he wanted a train load of two-year old steers at Nogales about the 10th of May (pp. 48, 215).

The Plaintiff, on receipt of this notice, at once began to round-up the cattle at La Moraga and to move to Distilladero all the cattle which came under contract after Ramon Elias, who with Mr. Kibbey represented the Company, had cut out the unmerchantable cattle (pp. 257, 261). The cattle arrived at Distilladero about May 5th.

On May 3d the Company wired Hall that they would have at least one train load for the 10th of May (pp. 34, 161). Oliver replied that he would arrive at Nogales on the 9th to cut "two-year old steers" (p. 33).

Accordingly, on May 9th Oliver went with Mr. Johnston of Clay, Robinson & Company and a Mr. Howe, who was one of Mr. Hall's employees, to inspect the cattle at Distilladero (pp. 161, 259).

On arriving there Oliver and Johnston rode through the herd on horseback. After a while they came out and Mr. Johnston told Elias the cattle were too thin to ship (pp. 259-261). Elias heard Oliver trying to persuade Johnston to take the cattle but in vain, for Oliver then asked Elias for three days in which to take up the matter with another prospective customer of Clay, Robinson and Company at Tucson. Elias agreed (p. 260).

About the 12th of May, Oliver came back with Plaintiff Hall and a man by the name of Gillespie and went with Elias to Distilladero (p. 262).

After Hall and Oliver had inspected the cattle for a little while, Hall came out and declared that the herd contained too many unmerchantable cattle and that the cattle were not according to the contract (p. 262). Hall also stated to Mr. Myers, who, with his partner, Mr. Tankersley, was also present, that there were a whole lot of yearlings there. Myers then bet with Hall as to whether or not a steer pointed out by Hall as a yearling was one, and won his bet, as the steer proved a two-year old on the teething test (p. 262, 265). Hall, nevertheless, refused to cut out from this herd a train load lot, but selected about twenty-five of the best white face, red and best colored cattle as the steers he expected to receive under the contract. Elias told him that that was not the kind of cattle referred to in the contract. Hall refused to make any attempt to cut unmerchantable cattle on the ground that there were not more than four hundred fifty to five hundred two-year old steers after all unmerchantable cattle and cattle not in condition to ship were cut out (pp. 136, 266).

They then returned to Nogales, where Hall conferred with Kibbey, who was the president of the Company (pp. 213, 220). Kibbey assured Hall that the cattle tendered for delivery as above set forth complied with the contract in every way (p. 220). A compromise agreement was discussed. Mr. Hall then left Nogales. On May 14, 1913, Hall wired to the Company that he

would be ready to receive all cattle coming within the contract between May 29th and June 1st, 1913, in train load lots (p. 138-139). It is to be remembered at this point that the contract clearly did not contemplate delivery of all the cattle at one time (p. 10).

On May 14, 1913, Hall received a letter from the Company advising that it considered the contract forfeited by Hall owing to his failure to cut or receive the cattle tendered on the 12th of May, 1913 (pp. 39, 138).

The summons was served on February 27, 1914. The complaint averred the contract between the Company and Myers, the payment of ten thousand ($10,000) dollars by Myers to the Company, and the assignment of the contract to Hall who is the owner and holder of all the rights thereunder. The complaint also included allegations of readiness and willingness to perform until May 13, 1913, on the part of Hall, that the Company had failed to deliver to Hall cattle in the numbers, of the grade, brand, kind and character required by the contract, and that the Company had on May 13, 1913, notified Hall in writing that it would not make any delivery to him except of cattle of the kind already tendered. This tender was alleged not to have been within he terms of the contract because the cattle were not "in train load lots as good or better than the 'Terrasas cattle' or of the grade, kind, character, brand or numbers required under the terms of said contract." The complaint demanded the return of the ten thousand ($10,-

000) dollars prepayment and in addition the two ($2) dollars per head damages provided for by the contract, aggregating a further ten thousand ($10,000) dollars.

The answer puts in issue the material allegations of the complaint.

The Assignment of Errors will be discussed as follows: Under Point I, Error XXIX (See Record, p. 113); under Point II, Errors II, VI, XVII, XX, XXI, XXVIII and XXXI (See Record, pp. 84, 90, 107, 109, 113 and 116); under Point III, Errors VIII, XXIV, XXX (See Record, pp. 92, 111 and 114); under Point IV, Errors III, IV, V, VII, IX, X, XIII, XIV, XV and XVI (See Record, pp. 86, 87, 89, 91, 93, 94, 102, 103, 105 and 106); under Point V, Error XVIII (See Record, p. 108), and under Point VI, Error XXXII (See Record, p. 121).

POINTS.

I.

THE BURDEN OF PROOF WAS NOT UPON THE COMPANY TO SHOW THAT THE CATTLE TENDERED ON MAY 9th AND MAY 12th, 1913, FULLY COMPLIED WITH THE CONTRACT IN EVERY RESPECT.

At the request of Plaintiff below the Court gave following instruction to the jury (p. 332).

"You are instructed that the burden of proof is upon the Alamo Cattle Company, before they can recover judgment against plaintiff, to show that cattle alleged to have been tendered on May 9th and 12th, 1913, fully complied with the contract in every respect."

This instruction was duly excepted to at the proper time (p. 345), and was assigned as Error XXIX in the Assignment of Errors (p. 113).

We discuss this clear error at this point because an understanding of its extremely prejudicial character must be based on some review of the evidence on the question involved.

This action, as we have already shown, was based on an alleged breach of contract on the part of the Company in failing to deliver cattle in accordance with the provisions of the contract involved. The specific breach alleged was that the cattle tendered to the plaintiff by the Company did not comply with the contract (p. 7). In order for the plaintiff to recover it was clearly necessary that this breach of contract on the part of the Company should be proved. This breach was the gist of the action.

The evidence on the question whether the cattle tendered Hall on the 9th and 12th of May, 1913, complied with the contract, i. e., consisted of a train load of two-year old steers "as good or better than the Terrasas cattle" after all unmerchantable cattle and fifteen (15%)

per cent of the balance had been cut out, was conflicting. In summary form it was as follows:

Hall testified: that he saw the tendered herd on about the 13th. He did not count the number but was told there were eleven hundred (1100). He had been familiar with Terrasas cattle, and these were not as good by several dollars a head (p. 134). He told Elias that the herd contained nearly one-half yearlings (p. 135). There were not more than 450 to 500 head of cattle of the grade mentioned in the contract (p. 136). He cut out 8 or 10 steers from the herd which were under age (p. 137). A train load consists of somewhere between 650 to 750 head of cattle (p. 140). Fully 40 per cent of the cattle tendered were yearlings (p. 145). Hall lost a bet with Myers as to whether a certain steer was a two-year old or not. Thirty-five (35%) per cent would be the extreme limit of the cattle that would come under the contract after the contractual fifteen (15%) per cent had been trimmed out. This was characterized as a pretty good guess, based on looking over the herd (p. 146). Hall's sole ground for rejecting cattle tendered was that they were not as good as Terrasas cattle, and there was not a train load lot of them (p. 154). Fully ten (10%) per cent were too weak to ship, and fully forty (40%) per cent were yearlings (p. 155).

Oliver testified on behalf of plaintiff: that he had run a ranch adjoining the Terrasas ranch and knew Terrasas cattle (p. 160, 179). He inspected the cattle

on May 9, 1913. He thinks there were a trifle short of a thousand steers in that herd (p. 161). Not more than fifty (50%) per cent, if that many, about four or five hundred head, were contract cattle. This was without the fifteen (15%) per cent cut allowed by the contract. He told Elias that the herd was not properly tendered, not in shape for the buyer to cut (p. 162). On May 12th when Oliver inspected the cattle again, there were about the same cattle, possibly a hundred or two more (p. 165). About fifty (50%) per cent on this second day were contract cattle (p. 166). Hall and Oliver on horseback cut out cattle of the kind they wanted. There was not a sufficient number to make a train-load.

James A. Johnston testified on behalf of plaintiff: that he had been in the cattle business with Clay, Robinson & Company for fifteen (15) years (p. 185). Was told that herd of May 9th contained about twelve hundred (1200) head. Thinks this number substantially correct, but didn't count them. Not over twenty (20%) per cent of these steers were as good or better than Terrasas cattle (p. 187-188). He just looked the herd over without counting them (p. 190). There were a good many swaybacks, sore-footed cattle and runts. He did not notice any lump jaws or blinds. Saw a number of stags and numerous cattle too thin to ship. Made estimate by riding through the cattle back and forth (p. 192). His particular duty for his company is loaning money on livestock (p. 192). There were a number of

short ages in that herd. He judged the cattle by the growth of their horns, size and general looks (p. 193). Examination of the teeth is considered a test of the age ofMexican cattle. Does not know in what respect the teeth of a two-year old differ from those of a yearling (p. 193). Does not regard the teeth test the best method. Has handled a great number of Terrasas cattle (p. 194). Clay, Robinson & Company buy cattle on commission. After he had seen the cattle Johnston told Oliver that they were not the cattle he had contracted for (p. 195). Had inspected Terrasas cattle in Denver during the last five years (p. 199).

W. L. Howe, an employee of Mr. Hall, testified for plaintiff: that he had been in the cattle business for twenty years, had worked in the State of Chihuahua, Mexico, for four years and was acquainted with the Terrasas cattle, having handled them and helped classify them (p. 200). He went to Distilladero to cut the cattle on the 9th of May. He judged that there were from 700 to 800 head in that herd. Did not ride through the cattle, but helped herd them. Hard to say, but possibly 300 or 400 were as good as Terrasas cattle. Seven or eight hundred constitute a train load. There were quite a lot of yearlings and a good many that were not as good as Terrasas cattle. Great many sore-footed. He saw no swaybacks, but there were some cattle too thin to ship and a few runts. He saw no cripples, blinds, lamp-jaws, stags or bulls (p. 201). Howe said that in his

opinion he didn't think the average of that cattle was up to the grade of Terrasas cattle. Howe arrived at his figure of 700 as follows: Mr. Kibbey said there were about 600 head in the herd and they put in some more (p. 202). About 50% of the 700 or 800 cattle were unmerchantable (p. 203). Howe rode around the herd. There were a bunch of yearlings in that herd (p. 204). The best way to tell a steer's age is by toothing it. It is a fact that the general appearance of Mexican cattle is frequently deceptive if the cattle are thin and have not a good growth. Did not "teeth" any of that cattle. Could not swear positively that those he regarded as yearlings were yearlings (p. 205).

James Gillespie's affidavit was read for the plaintiff. He testified that he was familiar with the grade of Terrasas cattle (p. 206). He inspected this cattle on May 13, 1913. There were not more than 400 head of cattle that complied with the contract.

W. Beckford Kibbey testified for the defendant: that he had been with the Company six years and before that he had had experience buying cattle for butchers (p. 213). On May 9th, 1913, he went with Oliver, Johnston, Howe, Elias and a man by the name of Farr to examine the herd that was ready to be cut. With consent of Oliver the Compnay sold 560 three and four-year olds out of that herd to Farr. The balance, consisting of about 1400 head, were then tendered to Oliver. Johnston, after he and Oliver rode through the steers, said that there were

many short ages. Kibbey replied that there could not be many as practically all Sonora cattle are born before the 13th of May in each year. Johnston stated also that the cattle were sore-footed because many of them were lying down. Kibbey said they did that because they were tame. Oliver then told Johnston, whose principal objection was that the cattle would not ship, that they would ship (p. 217). About half an hour later Oliver, who had been endeavoring to sell the cattle to Johnston, told Kibbey the cattle did not come up to the contract (p. 218, 223). There was fully a train load lot of contract cattle tendered on May 9th. Between 600 and 700 head constitutes a train load (p. 224). It is a matter of opinion whether a steer is a runt, a stag or a swayback. There might have been a few. He saw no cripples (p. 224). There were no cattle too thin to ship in that herd. About ten days later the greater part of that herd was shipped to Canada. Had counted the herd. At least three-fourths of that herd came up to contract (p. 225-226). The herd had already been cut when shown to Mr. Oliver and had been placed in condition (p. 226). The herd tendered had been cleaned, they were all contract cattle, but the Company would not have objected if they had cut a little more than fifteen (15%) per cent (p. 240). If cattle in a herd are tame many of them will lie down (p. 241). If cattle walk without limping that shows their feet are not tender (p. 242).

Ramon Elias testified for defendant: that he had

been engaged in buying and selling cattle in Sonora, Mexico, for about twenty years (p. 252). He was familiar with Terrasas cattle, having seen a great deal of them (p. 253). A train load consists of from 620 to 1500 head of cattle (p. 256). On May 9, 1913, they offered to Mr. Hall about 1300 two-year old steers (p. 257). Mr. Oliver and Mr. Johnston inspected the herd on horseback (p. 259). After a while Mr. Johnston came out and said, "I think these cattle too thin to ship." Oliver told Johnston they would ship. They then went back to Nogales (p. 260). Nothing was said about the cattle not being as good or better than Terrasas cattle. In Elias' opinion they were in reality better than Terrasas cattle. Elias had cut out all he considered runts before the cattle were sent to Distilladero. Saw no swaybacks or blinds. There may have been eight or ten head that might have gotten a little sore-footed on the drive from La Moraga to Distilladero. The cattle arrived at Distilladero about the 5th of May. Noticed no unmerchantable cattle in that herd (p. 262). On May 12th, Hall, after he had inspected the cattle, told Elias that there were too many unmerchantable cattle in the herd (p. 262). Elias asked Hall to show him the unmerchantable cattle. This Hall refused to do, except that he lost a bet to Mr. Myers as to whether a certain steer was a two-year old or not (p. 265). Hall cut out 25 of the white face, red and best colored steers and said "that is the cattle I want." Elias replied that that was not the kind he had offered in the contract (p. 266). The

Company did not expect Hall to trim the herd. Elias had trimmed the herd of all cripples, blinds and sway-backs and everything that he considered unmerchantable at La Moraga (p. 266). There may have been a few yearlings as it is practically impossible for one to cut out every one that is a yearling. The three and a half days' trip between La Moraga and Distilladero, ending on the 5th, did not make the cattle unmerchantable on the 9th of May. Elias counted the cattle offered on May 9th—there were between 1300 and 1400 head (p. 271). The cattle were in shipping condition on May 9th (p. 272). This same herd was shipped to Canada and Denver to witness Donohue (p. 273). Elias did not count the cattle again on the 12th of May. The number was, however, approximately the same (pp. 274, 276). All the cattle tendered on the 12th were contract cattle (p. 277). There may have been some short ages in the herd, but Hall would not point them out except in one case, and that steer proved to be a two-year old (pp. 278-279). Elias thinks they were all two-year olds (p. 281). Oliver could have cut any he thought unmerchantable, short aged, or unshipable (pp. 281, 282). There may have been some stags. There may have been a few that were pretty thin (p. 283). Elias had tendered what he thought was right; the customer could have cut more than fifteen (15%) per cent (p. 283).

Thomas J. Donohue testified for the defendant that: he was 37 years old, and had been in the cattle business

all his life in the United States and Sonora (p. 286). He was familiar with Terrasas cattle, having handled and seen a great many of them (p. 287). A train load of Terrasas cattle would be between 500 and 1,000 head. He bought 940 head of cattle from the Company on May 20th (p. 287). These cattle were fully as good and probably better bred cattle than Terrasas cattle. He shipped them on the 22d of May to Denver, and to Canada, Wyoming and South Dakota. They were in merchantable condition. He inspected these cattle at Distilladero on May 9th and 13th (p. 288). Witness Johnston saw some of these cattle at Denver, with the Company's brand on and said if they had looked that good to him he would have bought them (p. 289). The cattle he saw on the 9th and 13th of May, and which he bought on the 20th, were fully as good or better than Terrasas cattle (p. 290). In buying the cattle he cut out about 300 head out of about 1300, leaving 940, of which 175 were three-year olds, and 693 two-year olds and 22 yearlings (pp. 293, 294, 295). He was to have had a fifteen (15%) per cent cut. He cut the herd and no objection was raised to his cutting (p. 294). As long as the cattle he bought were worth twenty-three ($23) dollars a head Donohue did not care whether they were as good or better than Terrasas cattle.

Ben Sneed testified for the defendant that: he had been engaged in the cattle business in Arizona, Sonora and Chihuahua, Mexico. He knows the Mexican brand

called Terrasas cattle. He thinks they are a little light-boned and don't weigh much. Had seen five or six thousand of them at one time or other at El Paso within the last four years. Saw the cattle Mr. Donohue bought from the Company on May 20th, 1913 (p. 297). Those cattle were just as good as or better than Terrasas cattle. Did not notice any unmerchantable cattle or any that were too thin to ship. They were bought for two-year olds. He would call them full age stuff. There may have been some that were under two. He inspected them pretty closely, but would not swear that all were full two-year olds (p. 299).

E. W. Myers testified for the defendant that: he has traded for cattle about fifteen years in Texas, New Mexico, Arizona, and Chihuahua and Sonora, Mexico. He had been familiar with Terrasas cattle seven or eight years (p. 306). About May 13th went to Distilladero with Oliver, Hall, Elias and others. He saw the herd there. The first thing Hall said was that there was not 20 carloads there. Myers told him that the contract called for a train load, that is to say at least 15 cars. Hall replied that there was not a train load of two-year olds there and that it was useless to cut them. Hall then lost a bet to Myers as to whether a certain steer was a two-year old, but Hall still insisted that it was useless to cut the cattle. Finally he cut seventeen of the best and said that that was the kind he wanted. He admitted that they would be good cattle in any country (p. 310).

He saw some stags, but saw no cripples, lump-jaws, swaybacks, blinds or cattle that could not ship. Possibly there were a few unmerchantable cattle in that herd. The big majority were two-year olds. There was a train load lot of two-year olds as good or better than Terrasas cattle in that herd (p 310). In the latter part of June, 1913, Myers met Hall, who told him he had made a mistake in not cutting the cattle (p. 311). There were from 1,000 to 1,400 head in that herd (p. 313). Myers was not prepared to say that all those cattle were full two-year olds; it is impossible to tell without throwing them down. Sometimes you are mistaken (p. 314). A man cannot ride up to a herd of 1,000 to 1,400 head and say that there were ten or twenty car loads or what not of two-year olds (p. 316). The value of cattle as good or better than Terrasas cattle at Nogales was less in May, 1913, than in April, 1913 (p. 317).

The conflict between the evidence of the two parties on the question of whether the cattle tendered on May 9th and 13th complied with the contract appears clearly from the above summary. There was also the fact that the contract between Hall and Clay, Robinson & Co., which was the sole means Hall had of performing the contract, passed on the fifteen per cent cut after all the unmerchantable cattle had been cut out, from Hall to Clay, Robinson & Co. (pp. 41, 156, 157). This, we submit, shows that Hall's attitude was that the cattle tendered by the Company had to satisfy Clay, Robinson & Company as well as Hall.

In view of all this, the extremely prejudicial character of the learned Court's error in instructing the jury that the burden of proof was upon the defendant to show that the cattle tendered on May 9th and 12th fully complied with the contract in every respect, readily appears. We submit, moreover, that the learned Court's general instruction that the plaintiff must prove every material allegation of the complaint by a preponderance of evidence in order to recover did not cure this important error. The instruction complained of was on a specific point and clearly modified the general instruction. That it was error, there can be no doubt.

This action is brought to recover part of the purchase price and liquidated damages because of breach of the contract. In chronological order the breaches assigned in the complaint were: tender of cattle that did not comply with the contract; notification in writing on May 13, 1913, that it would not deliver cattle of other kind and numbers than those already tendered; and failure to deliver cattle under the contract and to pay the twenty thousand ($20,000) dollars demanded because of the breach of the contract on part of the Company (pp. 7-8). These allegations of the complaint were denied in the answer (p. 16).

This denial put in issue all the material allegations of the complaint, and placed upon plaintiff the burden of showing the facts constituting the cause of action alleged therein.

San Francisco C. Agency vs. Widemann, 124 Pac. 1056 (Cal.).

Sharp vs. State ex rel. Board, 99 N. E. 1072, 1079 (Ind.).

Hill vs. Crompton, 119 Mass, 376, 381.

The fact that plaintiff was called upon to prove a negative does not affect the question. In Wigmore on Evidence, Vol. IV, p. 3524, the learned author says:

> "It is often said that the burden is on the party having the affirmative allegation. But this is not an invariable test, nor even always a significant circumstance. The burden is often on one who has a negative assertion to prove; a common instance is that of a promisee alleging non-performance of a contract."

New Albany vs. Endres, 42 N. E. 683, 686-687 (Ind.).

Boulden vs. McIntire, 21 N. E. 445 (Ind.).

Carmel Natural Gas & S. Co. vs. Small, 50 N. E. 476, 479 (Ind.).

Sawtelle vs. Sawtelle, 34 Maine 228.

The materiality of the allegation with respect to the tender of the cattle is evident. In order of time it was the first breach alleged in the complaint, and it appears clearly from the face of the complaint that it was the breach upon which the other alleged breaches depended. For, we submit, Paragraph VI of the complaint shows clearly that if the tenders of cattle were, contrary to the allegations, "of the kind, brand, character, or quality,

or grade, or numbers required" by the contract, then the whole structure of Hall's case would have fallen down. This results because Hall's readiness and ability to comply with the terms of the contract are alleged to have continued only up to the time of the receipt of notification from the Company that it would not deliver "other than the cattle of the kind, brand, character and numbers theretofore tendered" by the Company to Hall (p. 7). These tenders were thereupon alleged to be not within the contract. By these allegations Hall clearly assumed the burden of proving that the tenders of cattle did not comply with the contract.. Sawtelle vs. Sawtelle, 34 Maine 228. Moreover, the record shows that the validity of these tenders was, at the trial, made by Hall the principal issue of the case from the very start. Hall, indeed, adduced extensive proof, in the affirmative of his own case and not merely in rebuttal, that these tenders were not good under the contract. This evidence has been summarized above.

Each and every allegation of Paragraph VI of the complaint was denied by the answer (p. 16). Upon this issue and the others raised by the denials of the answer, the case went to trial. Under this plea the Company would have earned the judgment if Hall had failed to show that the tenders were bad. For as was held in San Francisco C. Agency vs. Widemann, 124 Pac. 1056, 1057, which was an action by a buyer to recover the purchase price, the burden of proof was upon the plain-

tiff to show the defendant's breach of the contract as alleged in the complaint, and if plaintiff first breached the contract without fault or failure of the defendant, no cause of action for the return of the money existed in favor of the plaintiff, and the defendant was properly permitted to avail himself of such defense under the general issue. Evidently, therefore, the denials in the answer were sufficient to raise all the issues upon which this case was actually tried.

The case having gone to trial and been tried on the issues raised by the denials contained in the first defense of the answer, which put upon plaintiff the burden of showing that the tenders did not comply with the contract, the burden is not shifted by the affirmative allegations that the tenders were in accordance with the terms of the contract contained in the separate defense (p. 20).

The object of the separate defense was to show that the contractual provision for the retaining by the Company of the $10,000 prepayment did not provide for a forfeiture, but was in the nature of a provision for liquidated damages (p. 22). In pleading to the complaint the Company's counsel were obliged to provide for the possible claim by Hall that this contractual provision was for a penalty and that the $10,000 should be returned to him on that account. For this reason the separate defense and the counter-claim alleging actual damage were inserted in the answer in anticipation of all possible contingencies. This question was not raised

at the trial, and consequently the Company relied solely on the first defense.

That these affirmative allegations in the separate defense did not shift the burden of proof, appears from the authorities which hold that a denial of the allegations of the complaint call upon the plaintiff for his proofs unaffected by further affirmative defenses of defendant.

Balmford vs. Grand Lodge, 42 N. Y. Suppl. 881, 883.

Fox vs. Held, 52 N. Y. Suppl. 724.

Botts vs. Vandament, 67 Cal. 332, 7 Pac. 753.

Amador County vs. Butterfield, 51 Cal. 526.

Moreover, Section 420 of the Civil Code of Arizona, 1913, provides that: "the answer may contain several different defenses."

Error in the instructions regarding the burden of proof is cause for a reversal.

Cole vs. Carter, 22 Tex. Civ. App. 456, 54 S. W. 914.

Particularly is this true in this case where, on the point in question, the evidence was very conflicting.

We submit, therefore, that because of this error alone reversal should follow.

II.

THE COURT ERRED IN ADMITTING AND EXCLUDING EVIDENCE AND IN ITS INSTRUCTIONS TO THE JURY WITH REGARD TO THE QUESTION OF READINESS, WILLINGNESS AND ABILITY ON THE PART OF THE PLAINTIFF TO PERFORM THE CONTRACT, AND IN ITS REFUSAL OF A NEW TRIAL BECAUSE OF FAILURE OF PROOF ON THAT SUBJECT.

This question was raised in the Assignment of Errors under Errors II, VI, XVII, XX, XXI, XXVIII, XXIX, XXXI (pp. 84-86, 90, 107, 109, 113, 116-121).

In the first place the learned Court erred in permitting the plaintiff to testify that he was ready, willing and able to pay for a train load of cattle (pp. 84-86, 141-142). This was a mere conclusion of the witness upon a matter that was not expert in its nature and was, therefore, immaterial and wholly insufficient to show readiness, willingness or ability to pay.

Goodrich vs. Sweeney, 36 N. Y. Super. Ct. 320, 325.

The contract placed upon Hall the following duty: "Payment of these cattle is to be guaranteed in a manner satisfactory to the First National Bank of Nogales, Ariz., before each shipment crosses the line."

Accordingly, defendant's counsel asked plaintiff's witness Oliver whether he had on May 9th made any

arrangements whatever with that bank for the guaranteeing of the payment of the cattle tendered on that day. This question was excluded (pp. 90, 177). It is to be remembered that the cattle was to be delivered at Nogales, across the border, on the 10th, that is to say, the following day (p. 34). This question evidently, therefore, tended to prove whether or not the plaintiff was ready and willing to perform the conditions of the contract and it was error to exclude it.

The general question was raised by Defendant's Written Request to Charge No. 3, which the learned Court refused to give and the charge without sufficient modification of Plaintiff's Written Request No. 7 (pp. 109, 114, 321, 332, 346). Moreover, the Court's charge to the jury contained repeated statements that if the cattle tendered by the defendant were not according to the contract then the plaintiff was entitled to a verdict, regardless of whether the plaintiff was able to or did furnish cars to receive the cattle and whether the guarantee of payment in a manner satisfactory to the bank had been arranged for. The learned Court emphasized and re-emphasized this instruction (pp. 116-121, 334, 336, 337, 341, 342, 348-352). We submit that this was prejudicial error, especially in view of the refusal to charge Defendant's Supplemental Request No. 7, as follows (pp. 113, 325):

"I further charge you that, even if you find that the cattle tendered to plaintiff, on May 9th or May 12th,

or both, were not up to the contract, yet if you believe and find that, prior to those dates or either of them, the plaintiff was not ready, willing and able to perform his part of the contract, then you must find for the defendant."

This refusal and the charge as given effectively took away all question of readiness, willingness and ability to perform the contract on the part of plaintiff from the jury. This was clearly error.

Goodrich vs. Sweeny, 36 N. Y. Super. Ct. 320, 325.

Iroquois Furnace Co. vs. Bignall H. Co., 201 Ill. 297.

We submit that even though the defendant had been guilty of a breach of the contract, yet the plaintiff was bound to show that he had performed, or was ready and able to perform the conditions the contract placed upon him up to the time of the breach. Such proof is a condition precedent to recovery.

Porter vs. Rose, 12 Johns (N. Y.) 208.
Bronson vs. Wiman, 8 N. Y. 182, 188.
Woolner vs. Hill, 93 N. Y. 576, 680.
Hess Co. vs. Dawson, 149 Ill. 138.
Russell vs. Excelsior S & M Co., 120 Ill. App. 23.
Neis vs. Yocum, 16 Fed. 168.
Reid vs. American Co., 136 N. Y. Suppl. 75.
Faber vs. Hougham, 36 Oregon 428.

Kellogg vs. Nelson, 5 Wis. 125.
Cook vs. Ferral, 13 Wend. 285, 287.
Cole vs. Hester, 31 North Car. 23, 26.

So far from showing such readiness, ability and willingness on his part on the 12th of May, 1913, the plaintiff had cancelled an order for 32 cars on May 9th, 1913, which he had ordered from the railway to ship the cattle in (pp. 43, 300). This put it out of his power to have the cars ready by the 12th if the cattle proved within the contract (pp. 300-304).

Moreover, the plaintiff Hall had made no arrangements whatever with the bank at Nogales relative to guaranteeing the payment of the cattle (pp. 144, 178). In view of the fact that this had to be done before the cattle crossed the line, it is obvious that there should have been some evidence adduced on this subject by the plaintiff.

The insufficiency of the evidence on this subject was raised by Error XVII and paragraph III of the Petition for a New Trial (pp. 67, 107). There it was pointed out that the plaintiff Hall himself testified that his only ability to perform his part of the contract after May 9th and before May 12th, 1913, lay in the sale of this cattle to Clay, Robinson & Co., through their representative, Johnston. As Johnston refused to accept the cattle on May 9th, it follows that on May 12th the plaintiff was not ready, willing and able to perform his part of the contract (pp. 142, 144-145, 155-156).

It should not be forgotten, moreover, that the contract between Hall and Clay, Robinson & Co., while providing for an advanced price, did not mention any grade (p. 41). Johnston's refusal to accept the cattle, therefore, had no bearing on the contract between the parties to this action.

Proof of readiness and willingness to perform a contract is part of the plaintiff's burden and it is not shifted by defendant's allegation of a want of performance.

Iroquois Furnace Co. vs. Bynill Hard. Co., 201 Ill. 297, 66 N. E. 237.

Eppens, etc., Co. vs. Littlejohn, 27 App. Div. 22, 50 N. Y. Supp. 251, Affd. 164 N. Y. 187, 58 N. E. 19.

Cummings vs. Tilton, 44 Ill. 172.

Duryea vs. Rayner, 46 N. Y. Supp. 437.
437.

In Simmons vs. Green, 35 Ohio St. 104, it is held that before a plaintiff can recover damages for non-delivery of goods he must prove that he was ready and willing to receive and pay for them as delivered.

III.

THE LEARNED COURT ERRONEOUSLY CONSTRUED THE CONTRACT TO PERMIT THE PLAINTIFF TO REFUSE THE TENDERED HERD OF CATTLE, EVEN THOUGH THERE

WAS A FULL TRAIN LOAD OF CONTRACT CATTLE THERE AND ONLY A FEW UNMERCHANTABLE CATTLE.

This question was raised in the first place by plaintiff's objection to the testimony of Mr. Johnston that he saw some unmerchantable cattle, sore-footed cattle and swaybacks and quite a number of runts and stags in the herd tendered on May 9, 1913 (Error VIII, pp. 92, 188). The Court admitted this testimony, thereby construing the contract to require the defendant to tender and offer plaintiff a herd of cattle which contained no defective or unmerchantable cattle at all; for otherwise, obviously this testimony would have been immaterial.

This construction of the contract was emphasized by the Court in refusing to give Defendant's Written Supplemental Request No. 1, and in his charge to the jury (Errors XXIV and XXX, pp. 111, 114, 323, 333, 335, 346, 347).

The Court's charge on this subject was as follows (p. 333):

"You are instructed that under the terms of the contract sued upon, the obligation was imposed upon the defendant to gather and deliver a train load lot of cattle complying in all respect as to grade and quality with the requirements of the contract, and plaintiff was under no obligation to examine, inspect or cut from the herd

of cattle gathered for delivery by defendant, cattle not up to such requirements. In other words, the plaintiff is not, under the terms of the contract sued upon, required to cut from any herd of cattle gathered, such cattle as there might be in the herd, consisting of runts, stags, cripples, lump-jaws, swaybacks, blinds, cattle too thin to ship, unmerchantable cattle, cattle under two year old, all cattle not of the grade as good or better than Terrasas cattle."

This charge was substantially repeated and re-emphasized by the Court (pp. 335, 347).

We submit that this construction is an unfair interpretation of the contract. A contract must be construed fairly to both sides. A contract will not be construed so as to give one party an unfair or unreasonable advantage over the other unless such was the manifest intention of the parties at the time it was made. Such reasonable construction as will make it effective according to the intention of the parties will be adopted. A contract must be construed as reasonably as its terms will allow.

Irwin vs. Kilburn, 3 N. E. 650, 104 Ind. 113.

Allemong vs. Augusta Ntl. Bank, 103 Va. 243, 48 S. E. 897.

Blitz vs. Union Steamboat Co., 17 N. W. 55, 51 Mich. 558.

Harz vs. Peterson, 80 Ill. App. 21.

We submit that the learned Court's construction of the contract gave the plaintiff an unconscionable advantage over the defendant not contemplated by the parties. Hall, according to this construction, could have refused these cattle even though a mere handful out of the 1300 cattle tendered were not within the terms of the contract. Taking the contract as a whole, its very provisions refute this construction. The clause allowing the plaintiff a fifteen (15%) per cent cut after all unmerchantable cattle had been cut out by the plaintiff shows clearly that the contract was one for the choosing of a train load out of a herd tendered.

As was shown above, the Company had made a bona fide effort to cut out all unmerchantable cattle and cattle not within the contract. What is unmerchantable or not, or what is of the grade of the Terrasas cattle or not, is obviously often a matter of opinion. The Court's harsh construction would have charged the Company with a breach of contract because there remained in the herd a few cattle which, in the opinion of Hall or of the jury, were swaybacks, runts, stags, blinds, lumpjaws, cattle too thin to ship, sore-footed cattle, or cattle below the Terrasas grade, even though the Company's agents considered them in good faith within that grade, and even though a full train load of cattle indisputably within the contract remained in the herd and were offered to the buyer in fulfillment of the contract. Ob-

viously the fifteen (15%) per cent cut clause was inserted to assure the buyer that all cattle to that extent which he might consider undesirable would be excluded. This clause is excellent proof that both parties considered this question a matter of opinion and, therefore, contemplated the probability of there being cattle at the time of tender in the herd which the buyer might not consider within the contract. The subject matter of the contract should also be considered in this connection.

The extreme rigor of the Court's construction appears clearly from the proof. We have seen that Hall took the position that he did not have to cut a train load lot from the herd, his mere statement that there were too many non-contract cattle in the herd appearing to him to be sufficient without any attempt to test its truth by cutting the cattle or making a close examination. All the evidence adduced by the plaintiff on this point was general in the extreme. It amounted to general statements that there was a large number of non-contract cattle in the tendered herds. No attempt whatever was made to cut out such cattle. The arbitrariness of this position is particularly evident in regard to the alleged short ages. The only really reliable test of the age of a steer is the examination of the teeth (p. 205). Plaintiff and his witnesses, however, contented themselves with sweeping statements. The fact that the plaintiff had to satisfy Mr. Johnston under a contract with terms differing from those of the Myers-Company contract must be considered.

We submit that if the plaintiff could have cut a train load of contract cattle from the herd the existence of some non-contract cattle in the herd would not have *ipso facto* breached the contract under a fair construction.

IV.

THE LEARNED COURT MADE NUMEROUS ERRORS IN THE ADMISSION AND EXCLUSION OF EVIDENCE, AND IN REFUSING TO CHARGE AS REQUESTED.

A. EVIDENCE OF AN ADMISSION BY PLAINTIFF.

The Company's counsel asked Mr. Hall whether he had not stated to Mr. Myers at El Paso in June, 1913, that he and Mr. Oliver had made a mistake in rejecting the cattle. The Court sustained plaintiff's objection to this question (Error III, pp. 87, 153).

An admission of this kind is particularly important where there is a conflict of evidence.

Union Mut. L. Ins. Co. vs. Masten, 3 Fed. 881.

The Court's ruling was clearly erroneous. In St. John vs. Leyden, 111 Ga. 152, 158, the action was for breach of warranty of title to land. It was held that evidence of an admission by the defendant that he had made a mistake as to one boundary line is admissible.

Snow vs. Paine, 114 Mass. 520.

Linnehan vs. Sampson, 126 Mass. 506.

In re Thompson, 197 Fed. 681.

B. IRRELEVANT TESTIMONY.

The Court allowed the plaintiff to testify that the contract between him and Clay, Robinson & Co. was not cancelled and that he furnished other cattle to that company under that contract (Error IV, pp. 87-98, 157). This evidence was clearly immaterial to the issues, and not binding on the defendant as it relates to transactions and statements between other parties.

C. HYPOTHETICAL ANSWER OF WITNESS.

Plaintiff's witness Oliver answered a question as to whether he cancelled the order for cars before or after his trip to Mexico as follows: "If I cancelled them before, it was because the cattle would not have been loaded on the date I ordered them for. If I cancelled them afterwards, it was after I saw the cattle." The defendant objected to this answer but his objection was overruled (Error V, pp. 89, 164-165). This was clearly error.

Pilcher vs. United States, 113 Fed. 248, 251.

McFarlane vs. Howell, 16 Tex. Civ. App. 246, 250.

D. IMPROPER EVIDENCE AS TO SAMPLES.

In reply to the following question put to him by plaintiff's counsel, "What proportion of the cattle in that

herd were below the grade of Terrasas cattle?" plaintiff's witness Johnston said, "There was only about twenty or twenty-five per cent of the cattle that was tendered that were up to the sample that I looked at in the first trip." The Court overruled defendant's motion to strike out this answer (Error VII, pp. 91, 187). This was error. The answer was irresponsive and, moreover, the only proper test of performance was that set forth in the contract.

E. ERRONEOUS ADMISSION OF EVIDENCE AS TO REASON FOR AN ALLEGED FACT.

The Court refused defendant's motion to strike out the testimony of plaintiff's witness Johnston as to the reasons given by Mr. Elias for not being able to obtain certain brands of cattle. This, we submit, was error (Error IX, pp. 93, 189). The alleged reasons given by Mr. Elias were wholly immaterial to the issues.

F. ERRONEOUS EXCLUSION OF EVIDENCE RELATING TO MR. MYERS.

The defendant's counsel asked defendant's witness Elias concerning what was said by Mr. Oliver as to what Mr. Myers was going to do if he was present at the tender of the cattle. This question was objected to by the plaintiff, and the objection was sustained by the Court (Error XIII, pp. 102, 257-259). The contract between Hall and Myers provided that Myers or Tankersley, his agents, "shall be on the ground at the time

of delivery of all cattle, and aid and assist in receiving said cattle." This evidently constituted the one of them who was present at the tender of the cattle the agent of Hall in receiving the cattle. It was relevant, therefore, to show just what the degree of relationship between Mr. Hall and Messrs. Myers and Tankersley was.

Again plaintiff objected to any conversation had by Elias with Myers in the presence of the plaintiff. The Court sustained this objection (Error XIV, pp. 103, 262-264).

We have seen that the contract between them constituted Myers the agent of Hall for the purpose of receiving the cattle. Anything Myers may have said as to the cattle, particularly in the presence of Hall would, therefore, be binding on the latter.

Moreover, this contract shows that as between Hall and Myers the latter retained an interest in the contract, as he was to be paid three ($3) dollars and four ($4) per head for each of the steers delivered. The exclusion of conversations between Elias and Myers in the presence of Hall was, therefore, clearly error.

Caldwell vs. Auger, 4 Minn. 217.

Crippen vs. Graham, 88 North Car. 214.

Charleston Live Stock Co. vs. Collins, 79 South Car. 383.

G. ERRONEOUS ADMISSION OF EVIDENCE AS TO CUSTOM.

The learned Court overruled defendant's objection to questions propounded by plaintiff to defendant's witness Joffroy on cross-examination as to the custom of cancelling orders for cars (Error XV, pp. 105, 305-306). This evidence of custom was clearly immaterial and incompetent, as the issue was what Mr. Hall had done in reference to this particular matter. As he had put it out of his power to supply cars in time for the delivery, the existence of a custom, even if competently established, could not save him. The immateriality of this evidence is particularly clear when it is considered that the custom claimed was simply the general one of canceling orders for cars to save demurrage and not one that had any relation to the circumstances of this case.

Moreover, the mere evidence by one witness that there existed at Nogales such a custom was wholly insufficient to establish its existence. This evidence was immaterial as it was not shown that the custom was uniform, certain or known to the Company.

Chicago, M. & St. P. Ry. Co. vs. Lindeman, 143 Fed. 946.

Continental Coal Co. vs. Birdsall, 108 Fed. 882.

Chilberg vs. Lung, 128 Fed. 899.

Great Western Elev. Co. vs. White, 118 Fed. 406.

H. REFUSAL TO CHARGE DEFENDANT'S WRITTEN SUPPLEMENTAL REQUEST NO. 4 WAS ERROR.

The defendant requested the Court to charge that: "A reasonable construction of the contract entitled the defendant to make deliveries during April and May, in train load lots, and defendant was not required to deliver all the cattle under the contract in one shipment or at one time, pursuant to the notice contained in plaintiff's telegram dated May 14th." This request the Court refused (Error XXVII, pp. 112, 324). We submit this refusal was error. The construction authorized by the learned Court would place an unconscionable burden on the defendant, and is not as reasonable or as obviously called for by the terms of the contract as the one expressed in the above request.

Irwin vs. Kilburn, 3 N. E. 650, 104 Ind. 113.

Allemong vs. Augusta Ntl. Bank, 103 Va. 243, 48 S. E. 897.

Harz vs. Peterson, 80 Ill. App. 21.

It is, we submit, a breach of contract to exercise it under an arbitrary and unreasonable construction.

Blitz vs. Union Steamboat Co., 17 N. W. 55, 51 Mich. 558.

I. ERRONEOUS ADMISSION OF EVIDENCE AS TO COMPROMISE CONTRACT.

Plaintiff's counsel asked plaintiff if the Company had delivered any cattle to him pursuant to the compromise contract testified to by plaintiff. The defendant's objection to this question was overruled (Error X, pp.

94, 209-211). This ruling was clearly error. What was done or not done pursuant to the compromise contract, was not relevant to the issue as set forth in the pleadings, in which there is no mention of such a contract.

Jordan vs. Fenno, 13 Ark. 593.

Frenchwanger vs. Manitawoc M. Co., 187 Fed. 713.

In Owl Creek Coal Co. vs. Goler, 210 Fed. 209, Judge Van Valkenburgh said at page 216:

"Where it clearly appears from the record that the evidence offered and excluded was competent and of such materiality and weight that its exclusion might have caused injury to the party offering the same, nothing further or more formal is required."

The same rule applies to the erroneous admission of evidence. We submit, therefore, that because of these numerous errors in the admission and exclusion of evidence alone, the judgment should be reversed.

V.

THE LEARNED COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE GROUND OF A VARIANCE BETWEEN THE PROOF AND THE PLEADING ON THE PART OF PLAINTIFF.

The plaintiff testified that after the cattle was ten-

dered to him on May 12, 1913, he offered the Company that if it would deliver to him a thousand four-year old steers in the fall at thirty-two ($32) dollars a head, crediting the ten thousand ($10,000) dollars already paid on the new deal, he would call off the contract sued upon. This compromise offer the plaintiff alleged that the Company accepted (pp. 137, 151,153, 209-210).

At the close of plaintiff's case the defendant moved for a directed verdict in its favor, and renewed the motion at the close of all the evidence upon the ground that the plaintiff's evidence showed that prior to the commencement of the suit and about May 12, 1913, the defendant had entered into a valid contract with the plaintiff with the purpose of compromising the then existing dispute between them with reference to the contract sued upon because such proof constituted a fatal variance with the pleadings, and because the plaintiff had proved a cause of action not alleged in the complaint. These motions the Court denied (Error XVIII, pp. 108, 212, 319).

We earnestly submit that the evidence of the plaintiff below showed that the contract sued upon had been superseded, modified and changed into an entirely different contract from the one alleged to the complaint. This, we submit, constituted a fatal variance.

Blake vs. Crowninshield, 9 N. H. 304.

Harrison vs. Kansas City C. & S. Ry. Co., 50 Mo. App. 332, 336.

Nerbitt vs. McGehee, 26 Ala. 748.

Central Tr. Co. vs. Colorado Light & P. Co., 200 Fed. 85, 88.

VI.

THE MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED.

The defendant moved for a new trial for all the reasons set forth above. This motion was denied (Error XXXII, pp. 60-79, 121). This was error. We submit that, because of the extremely prejudicial errors set forth above, a new trial will be granted. .

Respectfully submitted,

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With whom was John deR. Storey on the Brief.

Dated San Francisco,
October 15, 1914.